87-118

Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1987

JANET G. MAYNARD,

Plaintiff and Appellant,

v.

HARRY PRIESTER,

Defendant and Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether dismissal of Petitioner's case, pursuant to California Code of Civil Procedure Section 583.310, is a violation of her rights under the Fourteenth Amendment of the United States Constitution?[1]

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[1] List of parties:

JANET G. MAYNARD, Petitioner
and
HARRY PRIESTER, Respondent

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No. _____

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JANET G. MAYNARD,

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PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS BELOW

Decision and Findings of Fact and Conclusions of Law in the Second Appellate District, Division Two Case No. B017135. See Appendix "A" hereto.

Order Denying Review in the Supreme Court of the State of California. Case No. B017135, April 22, 1987. See Appendix "B" hereto.

JURISDICTIONAL STATEMENT

The statutory provision believed to confer jurisdiction on this Court to renew by Writ of Certiorari the judgment in question is 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS

The constitutional provision involved in this case is as follows:

(a) The "due process clause" of Section 1 of the Fourteenth Amendment to the Federal Constitution.

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

As pleaded in Petitioner's Complaint action was brought against Respondent to obtain relief for damages as the result of his renegement and breach of certain agreements to care and provide for, and support Petitioner. Respondent had obtained the trust and confidence of Petitioner and had agreed to provide for her for the rest of her life, and in return he had received her services as his confidante, travel companion, homemaker, decorator and real property manager (CT-14).[2]

Respondent did not file demurring papers until October 31, 1980 (CT 15), over one year after the Complaint was filed. Thereafter, hearing on the demurrer was continued three times at the request of Respondent

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[2] Hereinafter the Clerk's Transcript will be referred to as CT.

(CT 49, 52, 55), once at the request of Petitioner (CT 58). The demurrer was denied on March 2, 1981 (CT 59). The content and allegations contained in the Complaint are highly controversial as relief was sought for breach of argument arising during a nonmarital relationship during which Respondent maintained at least the appearance of cohabitation with his then wife (CT 491, 1-14).

Petitioner was able to successfully defend against demurrer at which time Respondent sought writ of mandate in the Court of Appeal by petition filed May 1, 1981 (CT 531-534). Upon denial of the petition by the Court of Appeal on May 14, 1981, (CT 531-534) Respondent petitioned the California Supreme Court for mandamus on May 26, 1981 (CT 531-536). The California Supreme Court denied the petition by notice dated June 10, 1981 (CT 533-536). Due to the time expended in these mandamus and demurrer proceedings, Respondent's Answer was not filed until July 17, 1981 (CT 65).

Petitioner filed At-Issue Memorandum on August 12, 1982 (CT 76-77). Respondent gave Notice of Trial Setting Conference set for June 15, 1984 (CT 258-259). At that time, the matter was taken off-calendar "subject to resetting" (CT 260-262).

Discovery commenced in or about late 1982 (CT 82) and continued to and throughout 1985 (CT 455). A protective order was sought against Respondent's overly intrusive discovery for which Respondent made a Motion to Compel (CT 124, etc., 144, etc.). The Motion to Compel was denied and the Motion for Protective Order was granted (CT 239-240).

Thereafter, Respondent moved for an amended answer to the complaint (CT 272). That motion was stipulated

to by Respondent (CT 453-454). Respondent filed his First Amended Answer on December 12, 1984 (CT 453-454), approximately three and one-half years after the filing of his Answer to the Complaint.

Throughout these proceedings, Petitioner was engaged in discovery as well as opposing motions made by Respondent. As is evidenced in the record, there was no "lack of prosecution" on the part of the Petitioner. Any delays caused in bringing this action to trial, were necessitated by Respondent's actions.

Notice of Motion and Motion to Dismiss Plaintiff's Complaint for lack of prosecution was filed on October 4, 1985 (CT 459). That motion, also, was opposed by opposition filed October 16, 1985 (CT 490). Petitioner, upon leave of the court filed and noticed Notice of Motion and Motion to Specially Set Trial Date (CT 496, 503, 507). On October 21, 1985, the Court granted the dismissal on authority of California Code of Civil Procedure Section 583.310 (CT 509).

ARGUMENT

A.

Petitioner Was Denied Due Process Of Law In Violation Of The Fourteenth Amendment To The United States Constitution.

1. Although impossibility, impracticability and futility is supposed to prevent application of the five-year rule, said excuse was arbitrarily not allowed herein.

Petitioner's right to due process of law was violated by the summary dismissal of a meritorious case by the lower courts.

California Civil Procedure Code Section 583.310 reads:

> "An action shall be brought to trial within five years after the action is commenced against the defendant."

This statute places an affirmative duty on plaintiff to act with reasonable diligence in order to bring a case to trial within the five year period. *Hill v. Bingham* (1986), (2nd dist.) 181 Cal.App.3d 1. While the plaintiff is required to act with due diligence, due diligence has been defined by the courts in a case by case analysis. This method does not, and cannot, lead to uniformity of decisions in the various courts where this issue will arise. Without a standard, by which litigants, and the courts, can be guided, the due diligence requirement of Section 583, as well as the exceptions contained in California Civil Procedure Code Section 583.310, can only result in confusion, and arbitrary, capricious and inconsistent state court action.

In the instant case, from the date of which the demurrer was originally noticed, October 28, 1980, through and

including June 10, 1981, the term of its pendency, it was impossible, impracticable and futile to proceed with this action and the five year period under C.C.P. Section 583.310 was tolled.[3]

Until the issues raised by the writ of mandate were finally resolved, Petitioner could not proceed with her case. Depending on the outcome of the demurrer and writ proceedings, there was a substantial likelihood that Petitioner would not be able to proceed with the Complaint. Due to the controversial nature of the allegations and the relief sought by the Complaint, it was very probable that an opinion of and decision by the trial court, Court of Appeal and the Supreme Court would be sought with respect to the viability of the action. Consequently, under California Civil Procedure Code Section 583.310(c) Petitioner acted with due diligence by reason of the impossiblity, impracticability, or futility of any other action on her part during the pendency of these proceedings. To, then, deny her of the right to litigate a meritorious case, by an arbitrary application of C.C.P. Section 583.310 without a review of the circumstances involved.

2. Plaintiff's obligation to proceed with due diligence is satisfied where the delays are caused by defendant's actions.

California Civil Procedure Code Section 583,

> ". . . requires the trial judge to exercise his discretion to prevent or deny the defendant's motion to dismiss if the plaintiff has failed to

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[3]The tolling period under this calculation is 225 days. The narrowest calculation would result in a 41 day tolling period, from May 1, 1981 to June 10, 1981, the period during which Respondent's writ petition was pending in the Court of Appeal and Supreme Court.

> have the trial of his action commenced within two years of the filing of the complaint. However, the exercise of this discretion is not free from appellant review if it has been abused. The trial judge may not act arbitrarily or capriciously in exercising his discretion. His decision must be governed by a consideration of existing legal principles and by the drawing of appropriate analogies to existing case law. [citation] Such discretion must be exercised in such a manner as to further, not defeat, the ends of justice [citation]."

City of Los Angeles v. Superior Court (1969) 271 Cal.App.2d 292, 294; 76 Cal.Rptr. 256. It has been said that absent a showing that "plaintiff has failed to exercise due diligence or fail[ed] to make a showing of excusable delay" dismissal will result. (*Id.* at 295.) Yet, while the "burden is at all times on the plaintiff to use diligence at every step of the proceedings to expedite his case to final determination" (*Gunner v. Van Ness Garage* (1957) 150 Cal.App.2d 345, 347; 310 P.2d 32) it is a violation of plaintiff's due process rights to summarily dismiss an action where defendant's dilatory inactivity expends substantial time resulting in passage of the five year limitation period.

As in the instant case, where Respondent created the necessity for time consuming proceedings, including a protective order in opposition to unsuccessful motions to compel discovery, the court should not arbitrarily dismiss an action without a thoughtful review of the circumstances. The Fourteenth Amendment to the United States Constitution guarantees "at a minimum . . . that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for

hearing . . ." *Mullane v. Central Hanover Co.* (1950) 339 U.S. 306, 313; 94 L.Ed. 865, 870; 705 S.Ct. 652. Where an individual cannot proceed with adjudication of his or her case because of adherence to a statutory rule, without a thoughtful review of the reasons behind the passage of time, then that person's right to be heard before being deprived of it is denied.

The Law Revision Commission Comment to California Civil Procedure Code Section 583.310 explains:

> "Subdivision (c) codifies the case law 'impossible, impracticable, or futile' standard. The provisions of subdivision (c) must liberally be interpreted, consistent with the policy favoring trial on the merits.
>
> Under Section 583.340 the time within which an action must be brought to trial is tolled for the period of the excuse, regardless whether a reasonable time remained at the end of the period of the excuse to bring the action to trial elipses."

It is obvious from the statutory scheme, and the policy behind them, that the legislature has attempted to expedite the bringing of cases to trial. Even so, there is a preference that all cases be litigated on their merits. The goal of litigation on the merits cannot be satisfied where there is no standard enunciated in either case law or statute.

Respondent, in his Respondent's Brief, cites with approval the decision in *Oberkotter v. Spreckels* (1923) 64 Cal.App. 470, 473; 221 P.698. Petitioner does not argue that "[i]t is true that the Defendant may bring about a trial of the case, but he is under no legal duty to do so. His presence in the case is involuntary and

his attitude toward it is quite different from that of the Plaintiff; he is put to a defense only, and can be charged with no neglect for failing to do more than meet the Plaintiff step by step." *Crown Coach Corp. v. Superior Court* (1972) 8 Cal.3d 540, 548; 503 P.2d 1374. The *Oberkotter* and *Crown Coach* courts were not faced with the same issue as is found in the instant case. In those cases, Defendant did not actively and affirmatively delay the proceedings with burdensome and unnecessary discovery.

In certain instances, as in *Oberkotter,* Plaintiff's lack of due diligence is strikingly apparent. In that case, there was a trial on the merits. The jury, unable to come to a verdict, was dismissed. For two years Plaintiff failed to file any papers or bring the case to trial. Thus, the court not only granted the dismissal but the dismissal was affirmed on appeal.

Some cases, though, are not as straightforward or as susceptible to strict, rigid application of C.C.P. Section 583, nor should they be. Discovery is a time consuming activity, one which cannot only be used but abused to delay settlement or judgment. A plaintiff's diligence can be subverted by a defendant's actions, whether in good faith or not. The courts should not only look to the diligence of a plaintiff but to the obstructions created by a defendant.

In the instant case, Respondent created the necessity for time consuming proceedings such as demurrer, a protective order and opposition to an unsuccessful motion to compel discovery. Very late in the action, even, at Respondent's request, Petitioner was requested to allow Respondent to file an amended answer. Under such circumstances, a court should not be allowed to dismiss a case that has been vigorously litigated on the

part of a plaintiff but, due to the actions of a defendant, the case does not come to trial within five years.

California Civil Procedure Code Section 583, should be flexible enough to allow a plaintiff "unable from causes beyond his control to bring the case to trial either because of a total lack of jurisdiction in the strict sense on the part of the trial court or because proceeding to trial would be both impracticable or futile" (*Woley v. Turkus* (1958) 51 Cal.2d 402, 407; 334 P.2d 12) to litigate his or her case on the merits and not be forced to, because of some strict adherence to a procedural requirement, be denied that right.

3. Where petitioner has acted with due diligence, where defendant's actions resulted in substantial delays and where no prejudice has been shown, dismissal of the case under authority of California Civil Procedure Code Section 583 is a violation of petitioner's due process rights.

Not only was Respondent unable to show a lack of due diligence on the part of Petitioner, but he has failed to show any prejudice to him by allowing Petitioner to litigate the merits of her case. Therefore, tolling of the limitation period was appropriate and dismissal improper. *Fay v. Mundy* (1966) 246 Cal.App.2d 231, 238; 254 Cal.Rptr. 591; *Westinghouse Electric Corp. v. Superior Court* (1983) 143 Cal.App.3d 95, 102; 191 Cal.Rptr. 549.

In *Campanella v. Takaoka* (1984) 160 Cal.App.3d 504 the plaintiffs applied for an order shortening time to five (5) days before the hearing on their motion to specially set the case for trial, informing the trial court that the five year statute would run in less than a month

and without such an order, plaintiffs' motion would be heard only two weeks prior to the running of the period (160 Cal.App.3d at pp. 509-509). The trial court denied plaintiffs' application for the order shortening time (*Id.*, at p. 509). Subsequently, plaintiffs moved to specially set the case for trial (160 Cal.3d at 509). Defendants opposed the motion and also requested that the action be dismissed pursuant to C.C.P. Section 583(a) (*Ibid.*) The trial court denied plaintiffs' motion to specially set. On appeal, the *Campanella* court reversed, holding that *it is mandatory* to grant a plaintiff's motion for an early trial setting.

The holding in *Campanella* is a correct interpretation of this Court's decision in *Weeks v. Roberts* (1968) 68 Cal.2d 802. Therein, the trial court vacated a trial date within the five year period and subsequently dismissed the action for failure to bring it to trial within that period. On appeal, this Court noted that certain Court of Appeal decisions had held that a refusal to specially set a case to avoid the bar of Section 583 is discretionary, and in ruling on a motion to specially set, the trial court could view the total picture, including the dilatory action of the plaintiff (68 Cal.2d, at p. 806). This Court held that the fact that a trial court believes a discretionary dismissal is warranted is not a ground for refusing to set a case within the five year period (68 Cal.2d at 806). This Court recognized that a trial court should not "exercise its discretion to dismiss on the basis of inconvenience to the trial court in the guise of a refusal to specially set." (68 Cal.2d at 807.) This Court held that the trial court did *not* have the discretion to refuse to set a date within the statutory period (68 Cal.2d at 808). *As a matter of law* "28 days is a reasonable time within which to set a matter for trial," and where less than 28 days is involved "*a preferred procedure would*

be to grant preferential dates expressly without prejudice to a motion to dismiss." 68 Cal.2d at 808. (Emphasis added.)

The *Campanella* case, *supra*, noted that the decision in *Karubian v. Security Pacific Nat. Bank* (1984) 152 Cal.3d 134, seemed to arrive at a contrary result, holding that the denial of an early trial setting was not an abuse of discretion even though the motion was noticed 40 days prior to the expiration of the five year period (*Campanella, supra*, 160 Cal.App.3d at 514). As the *Campanella* case noted, *Karubian* is not persuasive for various reasons, the most significant being that it relied on *General Ins. Co. v. Superior Court* (1966) 245 Cal.App.2d 366, *hearing denied*, which was limited by the subsequent decision in *Weeks v. Roberts, supra* (see *Campanella, supra*, 160 Cal.App.3d at 514). Moreover, the *Karubian* case did not address the proposition that the *Weeks v. Roberts* decision set down the rule that a "preferred procedure" is to grant preferential dates without prejudice to a motion to dismiss (68 Cal.2d at 808). As a "preferred procedure" it is mandatory on the trial court. See *Bozanich v. Kenney* (1970) 3 Cal.3d 567, 571. (The "preferred procedure", hereinabove discussed, not available only to a diligent plaintiff but also to one considered to have been less than diligent. This fact merely supports the avowed policy of litigating all cases on their merits and allowing all plaintiffs every opportunity to litigate their claims.)

Even if Petitioner was adjudged dilatory (which she was not) the *Campanella* and *Kotoff v. Efseaff* (1985) 172 Cal.App.3d 991 cases have correctly construed *Weeks v. Roberts, supra*, and have concluded the remedy for a plaintiff's failure to diligently prosecute is to grant

a discretionary dismissal, not to refuse to specially set. As pointed out above,

> ". . . a trial court should not confuse and discredit the law by refusing to set a cause within the five year period because it believes that a discretionary dismissal is warranted . . . if a court feels compelled to dismiss an action less than five years after its filing for want of prosecution, it should do so and accept review on that basis. It should not exercise its discretion to dismiss . . . in the guise of a refusal to specially set." (68 Cal.2d at 806-807.) (Emphasis added.)

In *Salas v. Sears, Roebuck & Co.* (1986) 42 Cal.3d 342, 347, 228 Cal.Rptr. 504, 507, the California Supreme Court held that where an "appalling" lack of diligence was shown, trial preference was not mandatory. Yet, no such showing was made before Petitioner was deprived of her right to have her claim adjudicated. After waiting so long, it was a violation of her Due Process rights to bar her from a trial on the merits.

In the present action, the matter was vigorously litigated, including defense against multiple demurrers, discovery and discovery motions and proceedings in the Court of Appeal. An at-issue memorandum was filed, but the trial-setting conference was taken off calendar in 1984 while discovery continued through 1985. Petitioner, throughout these proceedings, was acting with diligence and pursuing her claim even in the face of Respondent's actions.

Therefore, plaintiff and petitioner was wrongfully precluded from relief. The result of the trial court's action herein was unjust and inequitable, against law, and in violation of plaintiff's patent rights to due process and

equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution. As such, review by this Court is respectfully sought.

4. C.C.P. Section 583.310 is arbitrary, capricious and unreasonable and, as such, is violative of the constitutionally guaranteed right to due process.

The statutory scheme under which defendants in this State are allowed to seek dismissal of actions for "lack of prosecution" is in itself and in application applied arbitrarily, capriciously and unreasonably, in that permitting rote dismissal of actions which have been actively litigated after the running of a five year period is wholly arbitrary and unrelated to a legitimate state goal. Particularly absent tolling for periods of time in which, through action of defendant, prosecution of an action is not possible, the scheme bears no rational relationship to the goal it purports to accomplish — dismissal of actions for *lack* of prosecution.

In the present action, no findings were made by the trial court. Petitioner's action was summarily dismissed based on the purported running of a five year period notwithstanding tolling periods and active litigation during that period. The Court of Appeal herein specifically rejected all of Petitioner's tolling arguments and thereupon affirmed dismissal. As such, Plaintiff's rights under the United States Constitution, Fourteenth Amendment, to due process and equal protection of the law were violated, for which redress is therefore respectfully sought.

Recognizing the strong policy considerations of promoting effective and efficient adjudication of all meritorious claims, as well as the strong policy, of

litigating all cases on their merits, the arbitrary enforcement of the five year rule furthers neither one of these goals nor any possible, legitimate, goal of the State. In order to be a valid exercise of the State's power, the means to effectuate the sought end must neither be arbitrary nor capricious but rather, must further a legitimate State goal. In the instant case, the method by which the courts have dealt with Petitioner herein, serves no legitimate purpose but only operates to deprive Petitioner of her due process rights as guaranteed her by the Fourteenth Amendment of the United States Constitution.

CONCLUSION

For all the foregoing reasons, Petitioner JANET G. MAYNARD respectfully requests that this honorable Court grant her Petition for a Writ of Certiorari.

DATED: July 17, 1987

Respectfully submitted,

LAW OFFICES OF MARVIN M. MITCHELSON

By: _____

MARVIN M. MITCHELSON

Attorneys for Petitioner

JANET G. MAYNARD

APPENDIX

APPENDIX

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

JANET G. MAYNARD, Plaintiff and Appellant, v. HARRY PRIESTER, Defendant and Respondent.	)	B 017135 (Super.Ct.No. C 337 244)

COURT OF APPEAL-SECOND DIST.
FILED
FEB - 5 1987
CLAY ROBBINS, JR. Clerk
Deputy Clerk

APPENDIX "A"

Appeal from the dismissal of a breach of contract action for failure to bring the cause to trial within five years. (Code Civ. Proc., §§ 583.310, 583.360.)[1] Affirmed.

Janet Maynard commenced the action at bench against defendant Harry Priester on September 10, 1980. In her complaint, plaintiff alleged that some years earlier defendant had agreed, among other things, to divorce his wife, marry plaintiff, purchase a ranch to house plaintiff and her two children from a previous marriage, and support plaintiff, her children, and her mother for the remainder of their lives in consideration of plaintiff's agreement to act as defendant's confidant, travel companion, housekeeper, decorating consultant, and ranch manager. Plaintiff further alleged that defendant had actually given her money for the down payment on the purchase of a home, co-signed a purchase money note with her, and provided her with financial support for some time prior to breaching their alleged oral agreement. Plaintiff prayed for relief in the form of a constructive trust, damages, and specific performance of defendant's alleged promise to support and house her family.

On October 31, 1980, defendant filed a demurrer to the complaint. The trial court overruled the demurrer and defendant then petitioned Division Five of this court for a writ to compel the trial court to sustain his demurrer. Following the denial of both his petition for a writ of mandate or prohibition on May 14, 1981, and a petition for a hearing in the Supreme Court on June 10, 1981, defendant answered plaintiff's complaint on June 17, 1981.

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[1] Except as otherwise indicated, all statutory references are to the Code of Civil Procedure.

An at-issue memorandum was filed by plaintiff on August 12, 1982. In April 1984, plaintiff notified defendant that a trial setting conference had been scheduled for June 15, 1984. On that date, however, the matter was ordered "off calendar subject to resetting."

On October 4, 1985, defendant filed his motion to dismiss plaintiff's complaint on the ground that the five year period for bringing the action to trial had expired. Thereafter, on October 16, 1985, plaintiff noticed a motion to specifically set a trial date. On October 21, 1985, the trial court granted defendant's motion to dismiss plaintiff's action, thereby rendering plaintiff's motion to set a trial date moot. This appeal followed.[2]

Sections 583.310 and 583.360, subdivision (a), (former § 583, subd.(b)), provide, in pertinent part, that "[a]n action shall be brought to trial within five years after [it] is commenced" and, if it is not, that the "action shall be dismissed by the court . . . ." Section 583.360, subdivision (b), further provides that dismissal is mandatory and that the five-year deadline is "not subject to extention, excuse, or exception, except as expressly provided by statute." Section 583.340, however, specifically excludes from the computation of the five-year period any time during which it "is impossible, impracticable, or futile" to bring the action to trial (subd. (c)) or during which the court's jurisdiction to try the matter is suspended (subd. (a).)

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[2] Plaintiff's notice of appeal states the appeal is taken from the trial court's "ruling" of October 21, 1985. The minute order entered that date is not an appealable order. (See § 904.1.) To reach the merits of the cause, however, we will deem the minute order to incorporate a final order of dismissal and will interpret plaintiff's notice of appeal as applying to such final order.

On appeal, plaintiff first contends that the running of the five-year statute was tolled during the more than 220 days of the pendency of defendant's demurrer and petitions because it was impracticable and futile to bring her action to trial during that period. It is well settled that the excuses which warrant application of the impracticability and futility tolling provisions now codified in section 583.340, subdivision (c), do not encompass delays incident to the disposition of a demurrer. (See *Crown Coach Corp. v. Superior Court* (1972) 8 Cal.3d 540, 548; *Standard Oil Co. v. Superior Court* (1976) 61 Cal.App.3d 852, 857; see also *Anderson v. City of San Diego* (1953) 118 Cal.App.2d 726 729-731.)

Plaintiff also argues, however, that the five-year statute was tolled during the pendency of defendant's petitioners from the overruling of his demurrer because "the jurisdiction of the trial court was suspended" during the appellate proceedings. This contention misses the mark. The principle plaintiff here relies on is embodied in section 916, subdivision (a). That section deprives a trial court of jurisdiction to proceed with regard to a judgment or order from which an appeal has been perfected. A petition for a writ to compel a trial court to sustain a demurrer or to prohibit a trial court from proceeding after it has overruled a demurrer is an original proceeding, not an appeal (See Cal. Rules of Court, rule 56), and section 916, therefore, is inapplicable.

Finally, plaintiff argues that "crucial and extensive" delays were caused by defendant in bringing the action to trial and that the trial court had a mandatory duty to set a trial date prior to the expiration of the five-year period. A motion for preference in trial setting is addressed to the sound discretion of the trial court. (§ 36,

subd. (d); *Salas v. Sears, Roebuck & Co.* (1986) 42 Cal.3d 342.) The record on appeal does not reveal precisely why the trial setting conference of June 15, 1984, was taken off calendar. Nor is there any indication in the record of any request thereafter by plaintiff to specifically set a trial date, except plaintiff's notice of October 16, 1985, filed more than a month after the expiration of the five-year period. Plaintiff had the burden of bringing her cause to trial within five years after she filed her complaint. (*Massey v. Bank of America* (1976) 56 Cal.App.3d 29, 33.) The duty was hers at each and every stage of the proceedings "to use due diligence to expedite [her] case to a final determination." (*Crown Coach Corp. v. Superior Court, supra*, at p. 548.) At bench, plaintiff failed to meet her burden and the trial court properly dismissed her cause.

The minute order of October 21, 1985, granting defendant's motion to dismiss, is modified by adding thereto the following setnece: "The action is dismissed."

As so modified, the order is affirmed. Defendant Harry Priester shall recover costs.

NOT FOR PUBLICATION

We concur:

FUKUTO, J.

ROTH, P.J.

GATES, J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 2, No. B017135

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

JANET G. MAYNARD, Petitioner
and
HARRY PRIESTER, Respondent

MAYNARD

v.

PRIESTER

Appellant's petition for review DENIED.

SUPREME COURT
FILED
APR 22 1987
Laurence P. Gill, Clerk
S000337 DEPUTY

RECEIVED APR 24 1987

LUCAS

Chief Justice

APPENDIX "B"

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on July 17, 1987, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Lee J. Cohen
Offices of Leff & Jensen
9665 Wilshire Boulevard
Seventh Floor
Beverly Hills, California 90212

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 17, 1987, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

Supreme Court, U.S.
FILED
AUG 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-118

In the Supreme Court of the United States

October Term, 1987

JANET G. MAYNARD,

Plaintiff and Appellant,

v.

HARRY PRIESTER,

Defendant and Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

STATEMENT OF THE CASE

Petitioner's California state court action was dismissed because she failed to bring it to trial within the applicable five-year period required by California Code of Civil Procedure ("CCP") § 583.310. Notwithstanding that Petitioner failed to discharge her obligation to bring the case to trial within the five-year period, she now asserts in her Petition that she was denied due process of law by application of the statute to her case and that the statute is itself unconstitutional.

The record upon which Petitioner relies to support her Petition, if it may be described as such, is extremely meager. Although the Petition is silent as to the date on which Petitioner filed her Complaint in the Los

Angeles Superior Court, the decision of the California Court of Appeal (Appendix A, page 2, to the Petition), states that Petitioner's Complaint was filed in the Los Angeles Superior Court on September 10, 1980. The Petition concedes that Petitioner's Complaint was dismissed by the Los Angeles Superior Court on October 21, 1985, which was 5 years and 43 days after it was filed, and beyond the five-year limit prescribed by CCP § 583.310.

In her opposition to Respondent's Motion to Dismiss the Los Angeles Superior Court action, Petitioner did not assert that the statute was unconstitutional or that its application resulted in a denial of due process of law as to her case. Likewise, Petitioner failed to raise her constitutional contentions in her appeal to the California Court of Appeal, as appears from the Opinion of that Court (Appendix A to Petition). Petitioner's subsequent Petition for Review to the California Supreme Court was denied, without hearing, as reflected by Appendix B to her Petition. Therefore, her claimed constitutional rights violation was never considered by any of the courts of California.[1]

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[1]The California Supreme Court's refusal to grant a hearing in a given case means only that the " 'court does not consider that the interests of justice, or the purposes for which the power [to grant a hearing] was given, require its exercise in the particular case.' " *People v. Triggs* (1973) 8 Cal.3d 884, 891; 106 Cal.Rptr. 408, 412.

II

ARGUMENT

A. Introduction.

Petitioner's assertions before this Court are no more than a repetition of the unsuccessful arguments she raised in the California courts in which she asserted that her action should not have been dismissed because of her delays in its prosecution.[2]

In seeking certiorari by this Court, Petitioner asserts that her Fourteenth Amendment rights were infringed upon by application of CCP §§ 583.310 and 583.360 and that the statutes themselves are unconstitutional. The Petition, however, fails to state with any precision or specificity, let alone in general, how or in what manner Petitioner's Fourteenth Amendment rights were infringed upon, or why the statute is unconstitutional. The Petition asserts simply, in broad, truncated, conclusionary statements that because Petitioner lost her case on the merits in the California courts, the statutes involved were in some unexplained manner, unconstitutional or unconstitutionally applied. But the Petition is defective on other grounds as well, in that it fails to comply with the requirements of U.S. Sup.Ct. Rules 17 and 21.1(h). Moreover, and contrary to Petitioner's conclusionary

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[2]Petitioner has here repeated verbatim exact passages from her state court briefs, *e.g.* thus, repeated references throughout the Petition to ". . . this Court's decision . . ."; and "[t]his Court 'held' . . . "; "[t]his Court recognized . . ." (Petition, p. 4), referred to decisions of the California Supreme Court, and not to *this* Court before whom the Petition is pending. Similarly, Footnote 2 to the Petition, stating "hereinafter, the Clerk's Transcript will be referred to as CT," is identical to Footnote 2 to Petitioner's Opening Brief to the California State Court of Appeal. That reference is also misplaced as no transcript accompanies the Petition.

assertions, application of the California statutes to her case did not infringe her constitutional rights, the statutes themselves are not unconstitutional and no federal question is involved. Finally, none of Petitioner's constitutional claims were ever considered by, or passed upon, by any of the state courts of California.[3]

B. Dismissal of Petitioner's Complaint by the State Court of California Did Not Result in Her Being Denied Due Process, Nor Are the Statutes Involved Unconstitutional.

Petitioner's Complaint was dismissed upon Respondent's noticed Motion by the Los Angeles Superior Court pursuant to CCP §§ 583.310 and 583.360, which provide for dismissal of actions not brought to trial within five years after commencement.[4] The trial court's dismissal was affirmed on appeal (Appendix A to Petition).

The pertinent sections of the CCP are part of a long-established and flexible scheme enacted by the State Legislature providing for dismissal of actions for delay in their prosecution. The applicable five-year period can be extended however, under extenuating circumstances. Thus, CCP § 583.340(c) extends the five-year period "where it is impossible, impracticable, or futile to bring the action to trial" within five years; CCP § 583.340(a) extends the five-year period during the time within which

---

[3]Petitioner's failure to comply with the requirements of U.S. Sup.Ct. Rule 17 and her failure to articulate any factual or legal basis to support her unconstitutional contentions makes a response difficult, as it is always arduous to prove that which is nonexistent, or the negative where no positive is asserted.

[4]Chapter 1.5 of the California Code of Civil Procedure entitled Dismissal for Delay in Prosecution which includes §§ 583.110 through 583.360, appears in Title 8, Part II, of the California Code of Civil Procedure, and is set forth in full in Appendix A hereto.

"the jurisdiction of the court to try the action was suspended"; and CCP § 583.340(b) extends the five-year period while "prosecution or trial of the action was stayed or enjoined." CCP § 583.240 provides for extensions resulting from the inability to effectuate valid service of process; and CCP § 583.320 extends the time in cases where a new trial is granted.

Thus, the statutory scheme contemplates and accommodates for legally justifiable delays in not bringing an action to trial within the five-year period. However, dismissal will result in those instances in which a plaintiff fails to bring his or her case to trial within the five-year period because of his or her own negligence or indifference, as is the case here. *Crown Coach Corp. v. Superior Court,* (1972) 8 Cal.3d 540, 503 P.2d 1347; *Salas v. Sears Roebuck & Co.*, (1986) 42 Cal.3d 342, 228 Cal.Rptr. 504.

In explaining the underlying rationale for the dismissal statutes, the California Supreme Court stated in *Crown Coach*, at page 546:

> The dismissal statutes, like statutes of limitation, "promote the trial of cases before evidence is lost, destroyed, or the memory of witnesses becomes dimmed. The statutes also protect defendants from being subjected to the annoyance of an unmeritorious action remaining undecided for an indefinite period of time." (Citations.)

And the Court went on to observe that whether an extension of the five-year period would be available under its exceptions, was a question of fact:

> "Whether it is impossible, impracticable or futile to proceed to trial must be determined

> in the light of the circumstances in each case. [Citations.]" (Citations.) *Id.* at 547.

The underlying philosophy of the California statutes governing dismissal of actions for delay in prosecution, is that litigants have the right to have their claims heard and determined in the courts of the State of California, *but they also have the duty* to ensure that their claims are heard and determined within the applicable five-year period, absent extenuating circumstances permitting an extension.

In *Salas v. Sears Roebuck & Co., supra,*[5] the California Supreme Court applied that philosophy in affirming the trial court's dismissal of the Complaint there involved, holding:

> The situation confronting the trial court in the present case is nearly identical to that in *Wilson.* In both instances plaintiffs were guilty of an appalling lack of diligence and offered no justification for the delay. As in *Wilson*, plaintiffs here rely on our general policy in favor of trial on the merits. Once again, however, we conclude that although the interests of justice weigh heavily against disposing of litigation on procedural grounds—a policy we reaffirm—that policy

---

[5]Pages 10-13 of the Petition discuss *Campanella v. Takaoka,* (1984) 160 Cal.App.3d 504, 206 Cal.Rptr. 745; *Kotoff v. Efseaff,* (1985) 172 Cal.App.3d 991, 218 Cal.Rptr. 499, to support Petitioner's contention that her Complaint should not have been dismissed by the State Court. That discussion is wholly irrelevant to any of the issues raised by the Petition but, just as significantly, each of those cases was disapproved by the California Supreme Court in *Salas, supra*, at page 346, insofar as they held that there was a mandatory duty to set for trial, as asserted by Petitioner.

> will necessarily prevail only if plaintiff makes some showing of excusable delay. (Citations.)

42 Cal.3d at 347.

The *Salas* Court went on to describe the well-established procedural mechanics available to litigants to avoid dismissal under the five-year statute:

> In many instances—particularly when a motion for preferential trial setting is made several months before the five-year deadline—there will remain ample time for a plaintiff to prepare his case for trial and submit a second motion for trial preference on the basis that the case will otherwise face dismissal. By this means, a plaintiff may avoid the severe consequences of dismissal under either subdivision (a) or (b) of section 583.
>
> Plaintiffs here made no such effort. By their utter lack of diligence they forfeited their right to preferential setting for trial and were properly subject to dismissal. . . . *Id.* at 349.[6]

In her state court case, Petitioner failed to discharge her obligation to bring her case to trial within the applicable five-year period due solely to her own neglect. For her to contend here that she was denied due process because of her own dereliction, is as frivolous as is her wholly unsupported assertion that the California dismissal statutes are themselves unconstitutional.

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[6]Former CCP § 583(b), in effect at the time of *Salas*, was the predecessor to CCP § 583.310 which became effective in 1986. The two sections are essentially identical. Former CCP § 583(a), not involved in the California action, was replaced by CCP § 583.420(a)(1)(B), with slight modification.

C. Because Petitioner Failed to "Draw in Question" the Validity of the Pertinent Statutes Before the Courts of California, Certiorari Should Be Denied.

As observed above, Petitioner failed to "draw in question" the validity of the relevant sections of the CCP either on their face or as applied to her case in any of the prior state court proceedings. Her failure to do so should result in a denial of her Petition here, *Cardinale v. Louisiana,* (1969) 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398.

In *Cardinale*, certiorari was granted to consider petitioner's claims that a Louisiana statute which required that petitioner's confession be admitted into evidence in its entirety, was unconstitutional. At oral argument on the certiorari hearing, it was first disclosed that the sole federal question in issue had never been raised, preserved or passed upon in any state court. In ordering a dismissal of the petition, Mr. Justice White, speaking for the Court, stated:

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randell*, 10 Pet. 368, 9 L.Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344, 3 L.Ed. 120 (1809), and came to the conclusion that the judiciary act of 1789, C. 20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." (Citation.) The Court has consistently refused to decide federal constitutional issues

raised here for the first time on review of state court decisions both before the *Crowell* opinion, *Miller for Use of United States v. Nicholls,* 4 Wheat. 311, 315, 4 L.Ed. 578 (1819), and since, *e.g. Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn.* (citations).

In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C § 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system, it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds (citation), they should be given the first opportunity to consider them.

D. The Petition Fails to Comply With the Requirements of U.S. Sup.Ct. Rule 21.1(h), Depriving This Court of Jurisdiction to Review the State Court Judgment by Certiorari.

The Petition fails to comply with the requirements of U.S. Sup.Ct. Rule 21.1(h) in that it contains no statement specifying the stage in which the federal questions sought to be reviewed were raised in either the Los Angeles Superior Court or the California State Court of Appeal; the method or manner by which such

questions were raised, and the way in which the questions were passed upon by the state court. The Petition contains no quotation of specific portions of the record as will show that the federal questions were timely and properly raised so as to give this Court jurisdiction to review the state court judgment on writ of certiorari. The Petition is therefore fatally defective and should be dismissed on that ground alone.

E. The Petition Should Be Denied For Failure to Demonstrate That "There Are Special and Important Reasons" For Granting Certiorari.

The Petition is similarly deficient in even attempting to comply with U.S. Sup.Ct. Rule 17, which requires a showing that there be special and important reasons for granting certiorari. Rule 17.1(c) sets forth illustrations of such special and important reasons, such as that a state court "has decided an important question of federal law which has not been, but should be, settled by the Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

In commenting on the scope of this rule and the reluctance by the Court to grant certiorari, Mr. Justice Frankfurter in *Rice v. Sioux City Memorial Park Cementary,* 349 U.S. 70, 75 S. Ct. 614, 616, 99 L.Ed. 897 (1955), stated:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an *intellectually* interesting and solid problem. But this Court does not sit to satisfy a scholary interest in such issues. Nor does it sit for the benefit of the particular litigants. (Citations.) "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

> This is essentially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. (Citation.)

The reason the Petitioner here has not attempted to set forth any special and important reasons for granting certiorari is obvious—there are none. The Petition should therefore be dismissed.

III

CONCLUSION

Of all of the frivolous petitions seeking certiorari that must come before this Court, the one filed by Petitioner here must be exemplary. It is respectfully submitted that it should be summarily dismissed.

Dated: August 14, 1987.

Respectfully submitted,

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APPENDIX

CHAPTER 1.5
DISMISSAL FOR DELAY IN PROSECUTION

Art. 1. Definitions and General Provisions. §§583.110-583.161.
Art. 2. Mandatory Time for Service of Summons. §§583.210-583.250.
Art. 3. Mandatory Time for Bringing Action to Trial or New Trial. §§583.310-583.360.
Art. 4. Discretionary Dismissal for Delay. §§583.410-83.430.

ARTICLE 1
Definitions and General Provisions

Definitions. §583.110.
Application to civil action. §583.130.
Diligence required in obtaining disposition. §583.130.
Abrogation. §583.140.
Authority of court to dismiss action. §583.150.
Motion for dismissal. §583.160.
No dismissal when child support order in force. §583.161.

§583.110. Definitions.

As used in this chapter, unless the provision or context otherwise requires:

(a) "Action" includes an action commenced by cross-complaint or other pleading that asserts a cause of action or claim for relief.

(b) "Complaint" includes a cross-complaint or other initial pleading.

(c) "Court" means the court in which the action is pending.

(d) "Defendant" includes a cross-defendant or other person against whom an action is commenced.

(e) "Plaintiff" includes a cross-complainant or other person by whom an action is commenced.

(f) "Service" includes return of summons. **Leg.H.** 1984 ch. 1705.

§583.120. Application to Civil Action.

(a) This chapter applies to a civil action and does not apply to a special proceeding except to the extent incorporated by reference in the special proceeding.

(b) Notwithstanding subdivision (a), the court may, by rule or otherwise under inherent authority of the court, apply this chapter to a special proceeding or part of a special proceeding except to the extent such application would be inconsistent with the character of the special proceeding or the statute governing the special proceeding. **Leg.H.** 1984 ch. 1705.

§583.130. Diligence Required in Obtaining Disposition.

It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. Except as otherwise provided by statute or by rule of court adopted pursuant to statute, the policy favoring the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action in construing the provisions of this chapter. **Leg.H.** 1984 ch. 1705.

§583.140. Abrogation.

Nothing in this chapter abrogates or otherwise affects the principles of waiver and estoppel. **Leg.H.** 1984 ch. 1705.

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§583.150. Authority of Court to Dismiss Action.

This chapter does not limit or affect the authority of a court to dismiss an action or impose other sanctions under a rule adopted by the court pursuant to Section 575.1 or by the Judicial Council pursuant to statute or otherwise under inherent authority of the court. **Leg.H.** 1984 ch. 1705.

§583.160. Motion for Dismissal.

This chapter applies to a motion for dismissal made in an action commenced before, on, or after the effective date of this chapter, except that in the case of an action commenced before the effective date of this chapter:

(a) A motion for dismissal made pursuant to notice given before, on, or within one year after the effective date of this chapter is governed by the applicable law in effect immediately before the effective date and for this purpose the law in effect immediately before the effective date continues in effect.

(b) This chapter does not affect an order dismissing an action made before the effective date of this chapter. **Leg.H.** 1984 ch. 1705.

§583.161. No Dismissal When Child Support Order in Force.

No petition filed pursuant to Section 4503 of the Civil Code shall be dismissed pursuant to this chapter if an order for child support has been issued in connection with the proceeding and the order has not been revoked by the court or has not terminated pursuant to Sections 196, 196.5, and 4700 of the Civil Code. **Leg.H.** 1986 ch. 366.

ARTICLE 2
Mandatory Time for Service of Summons

Time limit for service upon defendant. §583.210.
Nonapplicability of time limit. §583.220.
Extension of time. §583.230.
Computation of time. §583.240.
Failure to obtain action within time limit. §583.250.

§583.210. Time Limit for Service Upon Defendant.

(a) The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision an action is commenced at the time the complaint is filed.

(b) Return of summons or other proof of service shall be made within 60 days after the time the summons and complaint must be served upon a defendant. **Leg.H.** 1984 ch. 1705.

§583.220. Nonapplicability of Time Limit.

The time within which service must be made pursuant to this article does not apply if the defendant enters into a stipulation in writing or does another act that constitutes a general appearance in the action. For the purpose of this section none of the following constitutes a general appearance in the action:

(a) A stipulation pursuant to Section 583.230 extending the time within which service must be made.

(b) A motion to dismiss made pursuant to this chapter, whether joined with a motion to quash service or a motion to set aside a default judgment, or otherwise.

(c) An extension of time to plead after a motion to dismiss made pursuant to this chapter. **Leg.H.** 1984 ch. 1705.

§583.230. Extension of Time.

The parties may extend the time within which service must be made pursuant to this article by the following means:

(a) By written stipulation. The stipulation need not be filed but, if it is not filed, the stipulation shall be brought to the attention of the court if relevant to a motion for dismissal.

(b) By oral greement [sic] made in open court, if entered in the minutes of the court or a transcript is made. **Leg.H.** 1984 ch. 1705.

§583.240. Computation of Time.

In computing the time within which service must be made pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The defendant was not amenable to the process of the court.

(b) The prosecution of the action or proceedings in the action was stayed and the stay affected service.

(c) The validity of service was the subject of litigation by the parties.

(d) Service, for any other reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control. Failure to discover relevant facts or evidence is not a cause beyond the plaintiff's control for the purpose of this subdivision. **Leg.H.** 1984 ch. 1705.

§583.250. Failure to Obtain Action Within Time Limit.

(a) If service is not made in an action within the time prescribed in this article:

(1) The action shall not be further prosecuted and no further proceedings shall be held in the action.

(2) The action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not, after notice to the parties.

(b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute. **Leg.H.** 1984 ch. 1705.

ARTICLE 3

Mandatory Time for Bringing Action to Trial or New Trial

Time limit for bringing action to trial. §583.310.
Time limit for new trial. §583.320.
Extension of time. §583.340.
Period of tolling or extension. §583.350.
Dismissal of action. §583.360.

§583.310. Time Limit for Bringing Action to Trial.

An action shall be brought to trial within five years after the action is commenced against the defendant. **Leg.H.** 1984 ch. 1705.

§583.320. Time Limit for New Trial.

(a) If a new trial is granted in the action the action shall again be brought to trial within the following times:

(1) If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision, within three years after the order of the court declaring the mistrial or the disagreement of the jury is entered.

(2) If after judgment a new trial is granted and not [sic] appeal is taken, within three years after the order granting the new trial is entered.

(3) If on appeal an order granting a new trial is affirmed or ajudgment [sic] is reversed and the action

remanded for a new trial, within three years after the remittitur is filed by the clerk of the trial court.

(b) Nothing in this section requires that an action again be brought to trial before expiration of the time prescribed in Section 583.310. **Leg.H.** 1984 ch. 1705.

§583.330. Extension of Time.

The parties may extend the time within which an action must be brought to trial pursuant to this article by the following means:

(a) By written stipulation. The stipulation need not be filed but, if it is not filed, the stipulation shall be brought to the attention of the court if relevant to a motion for dismissal.

(b) By oral agreement made in open court, if entered in the minutes of the court or a transcript is made. **Leg.H.** 1984 ch. 1705.

§583.340. Computation of Time.

In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The jurisdiction of the court to try the action is suspended.

(b) Prosecution or trial of the action was stayed or enjoined.

(c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile. **Leg.H.** 1984 ch. 1705.

§583.350. Period of Tolling or Extension.

If the time within which an action must be brought to trial pursuant to this article is tolled or otherwise extended pursuant to statute with the result that at the

end of the period of tolling or extension less than six months remains within which the action must be brought to trial, the action shall not be dismissed pursuant to this article if the action is brought to trial within six months after the end of the period of tolling or extension. **Leg.H.** 1984 ch. 1705.

§583.360. Dismissal of Action.

(a) An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article.

(b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute. **Leg.H.** 1984 ch. 1705.

ARTICLE 4
Discretionary Dismissal for Delay

Court's discretion in dismissal defined. §583.410.
Conditions for dismissal. §583.420.
Parties' compliance with court's terms. §583.430.

§583.410. Court's Discretion in Dismissal Defined.

(a) The court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case.

(b) Dismissal shall be pursuant to the procedure and in accordance with the criteria prescribed by rules adopted by the Judicial Council. **Leg.H.** 1984 ch. 1705.

§583.420. Conditions for Dismissal.

(a) The court may not dismiss an action pursuant to this article for delay in prosecution except after one

of the following conditions has occurred:

(1) Service is not made within two years after the action is commenced against the defendant.

(2) The action is not brought to trial within the following times:

(A) Three years after the action is commenced against the defendant unless otherwise prescribed by rule under subparagraph (B).

(B) Two years after the action is commenced against the defendant if the Judicial Council by rule adopted pursuant to Section 583.410 so prescribes for the court because of the condition of the court calendar or for other reasons affecting the conduct of litigation or the administration of justice.

(3) A new trial is granted and the action is not again brought to trial within the following times:

(A) If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision, within two years after the order of the court declaring the mistrial or the disagreement of the jury is entered.

(B) If after judgment a new trial is granted and no appeal is taken, within two years after the order granting the new trial is entered.

(C) If on appeal an order tranting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within two years after the remittitur is filed by the clerk of the trial court.

(b) The times provided in subdivision (a) shall be computed in the manner provided for computation of the comparable times under Articles 2 (commencing with Section 583.210) and 3 (commencing with Section 583.310). **Leg.H.** 1984 ch. 1705.

§583.430. Parties' Compliance With Court's Terms.

(a) In a proceeding for dismissal of an action pursuant to this article for delay in prosecution the court in its discretion may require as a condition of granting or denial of dismissal that the parties comply with such terms as appear to the court proper to effectuate substantial justice.

(b) The court may make any other order necessary to effectuate the authority provided in this section, including, but not limited to, provisional and conditional orders. **Leg.H.** 1984 ch. 1705.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on August 14, 1987, I served the within *Brief in Opposition to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Marvin M. Mitchelson, Esq.
Law Offices of Marvin M.
Mitchelson
1801 Century Park East
Suite 1900
Los Angeles, California 90067

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 14, 1987, at Los Angeles, California.

Siri Ved K. Khalsa
(Original signed)